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July 31, 1767.

Unto the Right Honourable the Lords of Council and Session,

T H E
P E T I T I O N
O F

ALEXANDER Earl of *Home*, Proprietor,
and *William Turnet*, Tacksman of *Fair-*
burn-mill, and Fishings thereof,

Sheweth,

THAT the River *Tweed* is the known Boundary between *England* and *Scotland*, for a Course of many Miles, in the lower Part of said River; whether that March stretches into the Middle of the Channel, from both Sides, as would be the Case of private Property, or whether, *e contra*, the whole collective Body of Water, which forms that River, does not constitute the March or Boundary of the two Kingdoms in those Parts, is a Point of nice Discussion; though your Petitioner inclines to think, that, was there occasion to try that Question, the last of these would be found to be the Case.

That the Heritors having their Property-grounds on both Sides of said River, have, by Grants from their respective Sovereigns, Right to the Salmon-fishings of said River, *ex adverso* of their several Properties. Such in particular is the Case of the Petitioner the Earl of *Home*, who, by Charters from the Kings of *Scotland*, of very ancient Date, stands

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infest in the *Fairburn-mill*, and Salmon-fishings thereto belonging; as the Earl of *Tankerville* on the opposite Side, Proprietor of the Estate of *Wark*, has in like-manner a Grant of the Salmon-fishings belonging thereto.

The Rapidity of the River *Tweed* in those Parts is so very great, as renders it impossible to fish in the Manner used in other Rivers, by the Drag, or Sweep-net; which therefore may well be supposed to have been the Reason why these Fishings have immemorially been exercised by means of a Dam-dike, which runs across the River from the North to the South Banks, having five small Holes in the Bottom of the Dam-dike, with Pock-nets placed on each of these Holes, and Back-nets a little below, and a small Barricade of Stones in the Channel of the River, to deaden the Streams where these Back-nets are placed: But then it is material to observe, that there now is, and constantly has been, a Gap or Opening in the Dam-dike, in that Part nearest the *English* Side, where the Stream of this River runs, by which at all times there is free Access to the Fish to get up the River, when there is so much Water that they can pass the Fords below, and the Dam-dike is so low, that when there is the least Swell of Water in the River, the Fish can easily pass over the same; nor has any Complaint hitherto been made, that this Dam-dike, which is so essentially necessary, both for the Fishing of that Part of the River, and for the Service of the Petitioner's Mill of *Fairburn* in Times of Drought, has been in any Degree hurtful to the general Fishing of this River, or to the Interest of the superior Heritors, several of whom have the like Dam-dike or Caul across the Channel of said River.

It is remarkable, that, from the one End of this River to the other, there is not a single Cruive thereon; a Singularity, which, according to your Petitioners Information is not the Case of any of the other great Rivers in *Scotland*.

This Specialty can only be accounted for from the Circumstances above taken notice of, viz. its being in part the Boundary



Boundary between the two Kingdoms, Cruives are not known or allowed in the Fishings of the Rivers of *England*, being justly considered as Instruments of Destruction, and pernicious to the Salmon-fishing in general, and therefore it was not to be expected, that the Sovereign of *England* would have permitted the Grantees from the Sovereign of *Scotland* to erect Cruives upon those Parts of the River common to both States, as the established Boundary between the two Kingdoms, or even upon those other Parts of the River which were wholly within the Territories of *Scotland*, whereby so great Prejudice must have been done to the Fishings of those Parts of the River, which, as the Boundary between the two States, was their Common-property.

Thus also it was, that, though in the various Acts of the Parliament of *Scotland*, respecting the Salmon-fishings, and prohibiting the killing of Salmon in certain Seasons, and with various Instruments, no Exception was made of this River of *Tweed*, prior to the Statute of 1597; it is manifest and clear, that these former Statutes were not understood to comprehend or extend to this River of *Tweed*, or to the River of *Annan* on the opposite Side of the Globe, as being *in pari casu*; for this plain Reason, that being in part the Boundaries of the two Kingdoms, it must have required the joint Concurrence of the legislative Authority of both Nations to have established any Regulations respecting those Rivers, which could not properly be said to be within either Kingdom.

And that such was the Sense and Understanding of the Parliament of *Scotland*, with respect to the various Statutes regulating the Salmon-fishings in the Rivers of *Scotland*, is apparent from the Statute 1581, Cap. 111. which, after ratifying and approving all the former Acts, respecting the Slaughter of Red Fish, Smolts, and Fry of all Fishes, and the Destruction of Cruives and Zairs, by reason of the Neglect in the Execution of these former Statutes, proceeds to appoint
certain

certain Commissioners and Judges, constitute his Majesty's Justices in all the different Parts of *Scotland*, for carrying into Execution these former Regulations, in all and each of the Rivers in *Scotland*, therein specially enumerated, excepting the River *Tweed*, of which no Mention is therein made, an Omission, which cannot be supposed to have proceeded from mere Oversight, and therefore is Demonstration, that these former Acts were not understood, for the Reasons above mentioned, to extend to that River.

And, agreeably thereto, when, by the Statute 1597, Cap. 265, these former Acts anent the Slayers of Black-fish in forbidden Times, Smolts, and Fry of all Salmon-fish, and for putting down of Cruives and Zairs, were again ratified and confirmed, a special Exception was made of the Rivers of *Tweed* and *Annan*.

The same Exception is repeated in the Statute 1600, Cap. 11. And, upon this Footing, Matters continued till after the Junction of the two Crowns, in the Person of King *James VI.* when a special Act of Parliament was made, respecting the Rivers of *Tweed* and *Annan*, which therefore merits particular Attention: It proceeds upon a Recital of the Exception of these two Rivers, from the last mentioned Act 1600, and mentions the Reason of that Exception to have been, that said Rivers, at that Time, "divided at many Parts the
 " Bounds of *Scotland* and *England* adjacent to them, where-
 " by the Forbearance upon the *Scots* Part of the Slaughter of
 " Salmon in forbidden Time, and of Kipper, Smolts, and
 " Black-fish at all Times, would not have made Salmon any
 " more to abound in these Waters, if the like Order had not
 " been observed upon the *English* Side, whilk Impediment
 " being now removed by the most happy uniting of both
 " Kingdoms in an Empire, in the Person of his most Excel-
 " lent Majesty, &c. therefore his Majesty and the Estates of
 " Parliament retreats, and perpetually annuls and abrogates
 " the said Exception of the said Waters of *Tweed* and *An-*
 " nan,

“ *nan*, and decerns and declares, that, in all Time coming,
 “ the Contraveeners of said Act, (*i. e.* the Act 1600, anent
 “ the slaying of Salmon-fish in forbidden Times, or of Kipper,
 “ Smolts, and Black-fish at any Time,) in the Waters of
 “ *Tweed* and *Annan*, or any Part of the same, shall, under-
 “ ly the Pains foresaid of Theft and Death, according to
 “ the Quality, Rank, and Estate of the Committers thereof,
 “ and as if the first Act had been general, and the said Ex-
 “ ception had never been contained therein.”

Sir *George Mackenzie*, in his Observes upon the Statute 1600, says, that the Reason why the Rivers of *Tweed* and *Annan* were excepted from that Act, was, because the killing Fish upon them prejudices only the *English* Fishing : But the Reason of this Exception, assigned by the Legislature itself in the Act 1606, is expressly said to have been, that these Rivers being in many Parts the Boundaries of *England* and *Scotland*, the Observance of these Regulations upon the *Scots* Part would have signified nothing, if the like Order had not been observed upon the *English* Side ; from which this Consequence may justly be drawn, that whatever other Regulations, respecting the Salmon-fishings, may be proper to be observed in those Rivers, which are wholly within the Kingdom of *Scotland*, yet, with regard to the River of *Tweed*, if these Regulations do not, or cannot, equally operate in the Fishing of those Parts of the River, the common Boundary of both Kingdoms, as seems to have been enacted by the Parliament of *England* after the Accession of King *James VI.* to that Crown, with respect to the Slaughter of Salmon in forbidden Times, and of Kipper, Smolts, and Black-fish at all Times, it would be equally improper and unprofitable to enforce the Observance of these other Regulations peculiar to the Rivers of *Scotland*, if those having Right to the Fishings in the same Parts of the River upon the *English* Side, are not, or cannot, be subjected to the same Regulations.

In 1762, *Lillie and Mitchell*, Tacksmen of certain Fishings belonging to the Duke of *Roxburgh*, situated many Miles above your Petitioner's Fishing of *Fairburn*, were pleased to bring an Action before the Sheriff of *Berwick* against *Turnet*, Tacksman of the Earl of *Home's* Fishing of *Fairburn*, libelling upon the old Acts of the Parliament of *Scotland*, concerning the killing of Black-fish, or fishing at forbidden Times; but more particularly, on the 33d Act 1696, ratifying these more ancient *Statutes*, whereby, " upon a Recital, " that the Salmon-fishing, *within this Kingdom* is much " prejudged by the Height of Mill-dams, that are carried " through the Rivers where Salmon are taken, it is ordained, " that a constant Slop in the Mid-stream of each Mill-dike, " and if the Dike be settled in several Grains of that River, " that there be a Slop in each Grain (excepting such Rivers " where Cruives are settled) and that the said Slop be as big " as conveniently can be allowed, providing always, the " said Slop prejudice not the going of the Mills situated up- " on any such River, and discharges all fishing at such Mill- " dam-dikes with Nets stented, or any other Engine whatso- " ever:—And therefore concluding, that *Turnet* should be decerned to leave sufficient Slops in the Dam-dike of *Fairburn* Mill-dam, and prohibited from placing either Pock-nets, Stented-nets, or other Engines, above or below these Slops.

Upon this Statute, of the Tenor above recited, the Petitioners will be allowed to observe, *First*, That the carrying these Mill-dam-dikes across the Channel of any River where there are Salmon-fishings, is not understood to be contrary to Law, or any Encroachment upon the Right of those who are intitled to the Salmon-fishings. *2dly*, That the Service and Supply of the Mills situated upon said Rivers, was considered to be a Right superior to that of the Salmon-fishing, as the opening of the Mill-dam-dike thereby appointed, is only to take place, when it can be done without

without Prejudice to the Mills.—*3dly*, That there is but one Slop required to be in every such Mill-dam-dike, where the River does not divide into different Grains.—*4thly*, That the Slop is to be placed in the Mid-stream.

That it is unnecessary upon this Occasion to trace the various Proceedings in said Process, either before the Inferior Court, or after it was brought into this Court by Suspension and Reduction, which is now become a Question of Property and Right between your Petitioner, the Earl of *Home*, and the Duke of *Roxburgh*, who have severally sifted themselves as Parties to said Process, it is sufficient to observe, that, upon Report of the Lord *Kennet*, your Lordships, of this Date, pronounced the following Interlocutor: “ The ^{22 July,} 1767. “ Lords find, that the Act of Parliament 1696, comprehends “ the River *Tweed*, where that River runs within the Juris- “ diction of the Courts of Law in *Scotland*, and that the “ Dam-dike or Dam-head in question, from the North-bank “ of the River, to the Middle thereof, is subject to the Re- “ gulation of that Act; and therefore, that the Suspenders “ ought to remove all Nets and Engines prohibited by that “ Act, and ought to make a Slop in the foresaid Part of the “ Dam-dike, where the Mid-stream or Current thereof runs, “ and remit to the Lord Ordinary to proceed in the Cause ac- “ cordingly.”

In pursuance of this Remit, at an after Calling before the ^{July 25th,} Lord Ordinary, his Lordship, of this Date, pronounced the ^{1767.} following Interlocutor: “ Ordains the Defenders to remove “ the Nets and Engines betwixt and the 6th of *August* next, “ and, in case they fail, authorizes the Pursuers to remove “ them upon the Defenders Expence; and prohibits and dis- “ charges them from placing or using them in the Dam- “ dike, in Time coming; and appoints the three Holes in “ the Dam-dike, ’twixt the Middle of the River and the “ North-bank thereof, to be kept open, except when the “ Sheriff shall find it necessary, upon Application of the De- “ fenders,

“ fenders, to fhut all or any of thefe Holes for a Time,
 “ when their Mill may happen to want Water, and decerns
 “ accordingly.”

By this Interlocutor, inftead of the Slop which your Lordships Interlocutor appoints to be made in that Part of the Dam-dike where the mid Stream or Current thereof runs, the Lord Ordinary has appointed the three Holes which now are in the North-part of faid Dam-dike, for ever hereafter to be kept open. And though the Petitioners would have no caufe to complain of this Alteration, if one or other of the two Alternatives muft needs be performed, yet if, from what will in the Sequel be fubmitted to your Lordships, it fhall appear that the Slop intended by your Lordships Interlocutor, as fupposed to be authorized by the aforefaid Statute, cannot be carried into Execution, confiftently either with the Words or Intendment of the forefaid Statute, and the State and Condition of this Part of the River *Tweed*, the Boundary of the two Kingdoms, it will be proper for your Confideration, how far it is competent to your Lordships to fubftitute any other Regulation in place of that which the Law itfelf had enacted.

But, upon Suppofition that the Regulation eftablifhed by the Lord Ordinary's Interlocutor, appointing the three Holes in the Dam-dike, between the Middle of the River and the North-bank thereof, to be kept open, excepting in Time of Drought, when your Petitioner's Mill may be in Want of Water, they muft fubmit it to your Lordships, if it would not be impofing an intolerable Hardship, that, upon every fuch Emergency, Application muft be made to the Sheriff, which would be attended with infinite Trouble, Expence, and Lofs of Time. Upon every fuch Application, the Sheriff behoved either to vifit and infpect the State of the River, or a Proof behoved to be taken, for afcertaining whether the Mill did require an additional Supply of Water; the Duke of *Roxburgh* behoved to be made a Party thereto: In a Word, it would lay the Foundation for fuch a Train of judicial Proceedings,

ceedings, upon every such incidental Occasion, as must prove extremely inconvenient and embarrassing; as, in the meantime, the Mill might be laid for Want of Water; and, therefore, the Petitioners cannot doubt that, was the Lord Ordinary's Interlocutor, in other respects, to be adhered to, your Lordships would see Cause to substitute some more equitable Rule, whereby your Petitioner should be entitled to close or shut up whatever Slop or Outlet, if any such shall be thought necessary, when the Service of the Mill requires the same.

But, as your Petitioners are hopeful to show Cause why no Alteration whatever ought to be made in the Form and Structure of this Dam-dike, as it has immemorially stood, or in the Method of Fishing, as immemorially practised; what they are humbly to offer upon these Points shall be confined within as narrow a Compass as the Nature of the Case will admit.

The first Point that occurs to your Lordships Consideration, is the general Question, Whether the Act of Parliament 1696 does extend to this River *Tweed*.

And, without repeating what has been already observed upon that Head, the Petitioners will humbly submit to your Lordships, that none of these old Acts of the Parliament of *Scotland*, were either intended, or, in the Nature of Things, could comprehend the Fishings of those Parts of the River *Tweed*, where it is the Boundary between the two Kingdoms.

It is not alledged, and the Petitioners believe it to be true, that there never was any Statute in *England*, prohibiting Mill-dam Dikes, or Fishing thereon, with Stented-nets, or other Engines whatsoever; and therefore, it is impossible to imagine, that the Legislature of *Scotland* could intend to regulate the Fishing on the *Scots* Side of this River, by means of a Dam-dike, carried across the Channel of that Part of the River, the Boundaries of both Kingdoms, subservient to

the *English* as well as the *Scots* Fishing, by Means of that Common-dike, where the Observance of such Regulations in the Fishing on the *Scots* Side, could be of no Advantage to the Fishing in general, if the like Regulations were not observed on the *English* Side, and could have no other Tendency, but to throw the whole Benefit into the Hands of those who had the Right of Fishing on the *English* Side.

It was plainly for this Reason, and to avoid any Doubt upon that Head, that the Statute 1597 and 1600, did specially except these Rivers of *Tweed* and *Annan*, from the Prohibition thereby re-enacted against fishing in prohibited Time, or killing of Black-fish, &c. and it was for the same Reason, that, by the Statute 1606, the aforesaid Exception *quoad* the Particulars above mentioned; were abrogated, in regard, that in consequence of the Junction of the two Crowns, the same Regulations had been established in *England*, with respect to the fishing in forbidden Seasons, and Destruction of the Fry, &c.

But as to this Hour there is no such Regulation in *England*, as prohibits Mill-dam Dikes and Fishing thereon, by Nets or other Engines, it would seem to follow, by necessary Consequence, that this, and every other Regulation peculiar to the Fishings in the Rivers within *Scotland*, were neither intended, nor can be extended, to the Fishings of those Rivers, or Parts of Rivers, which are the Boundaries between the two Kingdoms, and in that respect their common or joint Property. Your Lordships seem to have been aware of this, and therefore, by the aforesaid Interlocutor, the Regulations of the Act 1696 are confined to that Part of the Dam-dike from the Middle of the Channel to the North Bank, as supposing that Part of the River to be within the Kingdom of *Scotland*.

But this is what the Petitioner will be pardoned to say, is neither agreeable to the Words nor Intendment of the Statute; a River, such as this, which is the Boundary between
two

two Kingdoms, can with no Propriety be said to be within either Kingdom ; the whole River is a Boundary ; it is common to both ; and, as none of the Statutes, either of *England* or *Scotland*, in describing the Rivers within the respective Kingdoms, as subject to particular Regulations, make any Mention of Parts of Rivers, the Boundaries of the two Kingdoms, it is not reasonable to think, that it could be in the View of the Legislature of *Scotland*, to subject those Parts of the River *Tweed* to the Regulations respecting the Salmon-fishings upon Rivers within the Kingdom of *Scotland* ; and the Reason assigned in the Statute 1606, for abrogating the Exceptions by the Statutes 1597 and 1600, of the Rivers *Tweed* and *Annan*, seem, with all due Submission, to be demonstrative of this Proposition, it being thereby observed, with great Truth and Reason, that the Observance of these Regulations, in such Parts of the River *Tweed* and *Annan*, could be of no Utility, nor indeed practicable, where the like Regulations were not established in *England*, and where there is *eadem ratio, idem debet esse jus*.

And, as it must be apparent, that your Lordships have no Power to regulate this Dam-dike, or the Method of Fishing thereon, in the other Half of this River, it is humbly submitted, whether there is either Law or Reason for extending those Regulations, respecting the Fishings in the Rivers within *Scotland*, to those Parts of the River *Tweed*, which are the Boundaries of the two Kingdoms, when these Regulations cannot be binding upon those who have a joint Interest in the Fishing upon those Parts of the River, by Means of a common Dike, the Destruction of which, in the Manner proposed, by laying open a Slap in the Mid-stream, would be equally hurtful to the Earl of *Tankerville's* Fishing.

And this leads to state more particularly, such other Reasons as occur, why the Regulations prescribed by the Statute 1696, cannot be applied to the Dam-dike or Fishings in question, taking it for granted, that if the precise Regulations prescribed

prescribed by that Statute, had not been carried into Execution, when applied to this River, your Lordships will not think yourselves at Liberty to impose any Equipollencies.

And, in the first place, the Petitioners cannot avoid considering your Lordships Interlocutor, as proceeding upon Supposition of there being here two Mill-dam Dikes, the one upon the *English* Side, the other upon the *Scots*, and thereupon grafting this Consequence, that this Salmon-fishing, so far as regards the Half-dike, being across a River, within this Kingdom, must therefore be subject to, and governed by, the Laws thereof.

But, with all due Deference, this is plainly begging the Question. We say, and maintain, that as there is here but one River, not two Rivers; and, consequently, not two Dam-dikes, but one Dam-dike, running across the whole Channel in one continued Line, one End thereof resting on the South, the other on the North Bank, there is no dissecting either the River or Mill-dam Dike, thereby to make two out of one; and it is upon this that we chiefly found our Argument, that the Rules prescribed for regulating Fishings in the Rivers within *Scotland*, cannot extend to a River, such as this, the Boundary of the two Kingdoms.

To illustrate this, the Petitioner will suppose, that, by the Statute-law of our neighbouring Country, the Height of every Dam-dike, upon any of the Rivers of *England*, were ascertained to be ten Feet high, and that, by the Statutes of *Scotland*, the Height of such Dam-dike, in any of the Rivers in *Scotland*, were limited not to exceed six Feet, how absurd and ridiculous would it be to pretend, that a Dam-dike across the Channel of this River, where it is the Boundary of both Kingdoms, should be held as partly within the Kingdom of *England*, partly within *Scotland*, and therefore, that the one Half of the Dike must be built ten Feet of Height, the other Half but six Feet, if this could not obtain in the supposed Case, far less can it do in the real Case.

Neither

Neither your Petitioner nor the Earl of *Tankerville* are at liberty to take away this Dam-dike, or to vary the Form thereof, without the Knowledge and Consent of the other; it is a common Dike, upon a common Property, which must stand or fall *in totum*.

The Statute requires a constant Slop to be kept in the Mid-stream of each Mill-dam Dike; now, let the Case be supposed, that there were a similar Law in *England* respecting Mill-dam Dikes, there the Petitioners beg liberty to ask the Question, whether there behoved to be two Slops, one on the *English* Half, the other on the *Scots* Half? if there are two Dam-dikes, it must be so, whereas, if there are but one Mill-dam Dike, there must be but one Slop.

2dly, The Statute appoints this Slop to be in the Mid-stream, and that must certainly be in one of two Places, either in the Middle of the Channel, without regard to where the Stream is, or in the Stream itself, wherever that happens to be; and though your Petitioner is inclined to be of opinion, that it was the Intendment of the Law, that wherever the Stream was, there the Opening should be, neither the one nor the other can take place here.

It cannot be placed in the Middle of the Channel, because, by so doing, it would encroach upon, and lay open Lord *Tankerville's* Half of that Dike, and in Time of Speat, would expose the Dike to such an Inundation, that it could not possibly withstand the Shock, but would be swept away almost as fast as it was put up.

But the Petitioners do say, and, if needful, offer to prove, that that Part of the River which is both deepest, and the Stream strongest, is on the South Side; so that, was this Regulation to be so *Judaically* construed, the Slop must be upon the South Side, because there the Stream is, and in so far would be less hurtful to the Petitioner's Mill, but how this Slop shall be transferred from the one to the opposite Side of the River, or where the Law is which allows this, the Pur-

fuers have not thought proper to explain. It is plain, your Lordships cannot command the Slop to be placed upon the South Side of the Dike, because, *ex concessis*, it is *extra territorium*; so that, in every possible View, it is impracticable to place this Slop, by your Lordships Authority, upon any Part of the South Side of this Dike; and, if it cannot be placed there, it can have no place at all, because the Statute has fixed the precise Place where it should be; and it is reasonable to think, that it was for these Reasons your Lordships resorted to that Part of the Dike which is upon the North Side, considering that to be a Dam-dike separate and independent by itself, whereas, in reality, it is but Part of a Dam-dike common to your Petitioners and Lord Tankerville.

If any Liberty of Construction is to be allowed, your Lordships will certainly be of opinion, that if this Lock was to be placed upon any Part of the whole Dam-dike where the Stream is, the Purpose of the Law would be answered. Now, the Petitioners do say, and the Fact is not denied, that there is now, and has always been, a very large Slop or Open on the South Side, to which the Fish can have Access at all Times; and that being the Case, it is not easy to conceive what more the Pursuers can demand.

They are indeed pleased to say, that that Passage, or Open, is so choaked up with Rubbish, that the Fish can have no Access to it, but as this Averment is unsupported by any Proof, so the Petitioners refer to the Oaths of *Alexander Black*, F. 2. D. *Andrew Peatson*, F. 3. B. *Richard Henderson*, F. 3. D. *George Fairburn*, F. 4. A. and *Nicol Ewart*, F. 4. E. And upon all these Grounds jointly and severally taken, the Petitioners submit to your Lordships, whether this River is comprehended under the Rules prescribed by the Statute 1696, and supposing it were therein comprehended, whether the Regulations thereby prescribed have not been sufficiently complied with, in the particulars complained of.

But,

But, supposing your Lordships were to adopt the Lord Ordinary's Interlocutor, the Regulations thereby prescribed would seem impracticable, the River proving frequently so low, and the Holes being placed so much upon a Level with the Channel, that every Drop of Water would get out thereby, not to mention the constant Squabbles and Debates that must ensue in stopping and opening these Holes from time to time, as the Necessity of the Mills requires a greater or less Degree of Water.

Every Argument hitherto urged for satisfying your Lordships, that the River *Tweed* was not meant to be comprehended under the Statute 1696, nor the Regulations prescribed by that Statute applicable to this River, must be of equal Force upon the other Question, respecting the Modes of fishing by Nets or other Engines, aided or assisted by these Dam-dikes; this was one of the chief Purposes for which the Dam-dike was erected, it has been so used immemorially, so that now to quarrel it, must appear rather too late; the Judgment that was given in the Case of the Water of *Ericht*, was infinitely stronger than any thing that occurs in the present Case, the Water there, was so effectually barricaded, that not a single Fish, even in the highest Speats, could pass up the River, and yet because it had been immemorially so possessed, without Challenge, your Lordships did not think yourselves at liberty to lay it open, but continued Mr. *Mackenzie* in the Possession thereof.

That Lord *Tankerville* cannot be restrained from Fishing upon this very Dam-dike with these Nets is undeniable, what then can it advantage the Pursuers, was it in their Power to throw the whole Benefit of this Fishing into Lord *Tankerville's* Hands? one Consequence is certain, that he must, and will stop up that Out-let or Open, at the Extremity of the Dike next to his Side; how far that will benefit the Pursuers

fuers your Lordships will judge, though the Petitioners cannot but think, they are hardly dealt by, to be thus singled out, when there are so many other Dam-dikes across this River, where the Regulations now contended for are not observed, particularly, in the noble Duke's own Dam-dike.

May it therefore please your Lordships, to alter your former Interlocutor, and the Lord Ordinary's Interlocutor, both above recited, and to sustain the Defences, and assolzie: And in case the Lord Ordinary's Interlocutor shall be affirmed, quoad the 1st Part thereof, to substitute some other more equitable Rule, whereby your Petitioners may be intitled to have the Out-lets through this Dam-dike, of whatever Nature these shall be, closed and shut up, when a greater Supply of Water is necessary for the Service of the Mill, than by applying to the Sheriff in the Form and Manner prescribed by the Lord Ordinary's Interlocutor, and to give your Petitioner's such other Relief in the Premisses, as to your Lordships shall seem just.

According to Justice, &c.

ALEX. LOCKHART.



